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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1202

UNITED STATES OF AMERICA,
Appellee

versus

55 GAMBLING DEVICES and
NICK PUTCH, d/b/a SOUTHERN MUSIC &
CIGARETTE COMPANY,
Appellant

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1974

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UNITED STATES OF AMERICA,

Appellee

versus

55 GAMBLING DEVICES and
NICK PUTCH, d/b/a SOUTHERN MUSIC &
CIGARETTE COMPANY,

Appellant

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT ON BEHALF OF
PETITIONER:

NICK PUTCH d/b/a
SOUTHERN MUSIC & CIGARETTE COMPANY

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered on December 23, 1974.

CITATION TO OPINION BELOW

The opinion of the United States District Court for the Western District of Louisiana is unreported; however, a copy thereof appears in the Appendix at pages 17-22.

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the District Court is reported at 505 F. 2d 658 and a copy thereof appears in the Appendix at pages 23-24.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was made and entered on December 23, 1974; a copy thereof is appended to this petition in the Appendix at pages 23-24.

On January 27, 1975, petitioner herein filed a motion to stay the mandate of the Fifth Circuit Court of Appeals in

this matter, pending the filing of this petition for certiorari.

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

This proceeding for forfeiture of the fifty-five gambling devices seized herein by the Federal Bureau of Investigation, was brought by the United States under 15 USCA Sec. 1173(a) (3). Petitioner herein, Nick Putch, is the owner of these pinball machines.

The United States District Court held that the owner of these machines, Nick Putch, was engaged in the business of repairing, reconditioning, buying and leasing pinball machines; that he knew at the time he purchased these machines that they had traveled in interstate commerce; and, that the machines were

identical to those involved in United States v. 5 Gambling Devices, 346 F. Supp. 999 (1972). The court did not find that Nick Putch had any knowledge whatsoever of 15 U.S.C. 1173 (1) (3).

The United States Court of Appeals for the Fifth Circuit affirmed the District Court in a per curiam opinion.[1]

1. "Our examination of the record convinces us that even if knowledge on the part of the appellant was necessary to validate the forfeiture, there was sufficient evidence to sustain the comprehensive statment of the district court that it found no support for any of appellant's defenses. Testimony was taken specifically for the purpose of establishing whether the appellant had knowledge of the registration requirements. The testimony revealed that appellant had been engaged in the gambling device business for many years, and that in the course of his business he received literature from companies advertising gambling devices. Samples of this literature, which included warnings about registration requirements, were introduced in evidence. It is clear that the district court could have fairely inferred that a person engaging in the gambling device

(footnote continued on next page)

I.

May the court fairly infer that Nick Putch had knowledge of 15 U.S.C. 1173(a)(3) from a record showing only that advertising circulars, containing a notice of the registration requirements, the authenticity of which was challenged but never proved, the types of which were sent only to "distributors"[2] and not "owners"[3] like Nick Putch, and the likes of which were never received by him?

(Footnote 1 - continuation)
business over an extended period of time, and who was regularly receiving advertising circulars like the kind shown to include warnings, had knowledge of the registration requirements of the statute."

2. "Distributors" as used herein refers to those who purchased pinball machines in interstate commerce such as Nick Putch's vendor, who purchased machines directly from Chicago.

3. "Owners" as used herein refers to those who purchased, intrastate from "distributors", pinball machines.

II.

Did the court err in failing to find knowledge of the requirement to register under 15 U.S.C. 1173(a) (3) a prerequisite to the enforcement of the forfeiture provisions of 15 U.S.C. 1177 in contravention of this court's holding in Lambert v. California, 355 U.S. 255; 2 L. Ed.2d 228, 78 S.Ct. 240 (1957) and in the case of United States v. Mancuso, 420 F.2d 556 (2nd Cir. 1970).

III.

Does 15 U.S.C. 1173 (a) (3), as applied to Mr. Putch, deny him due process, in that the Government never made known to him the requirement to register prior to effecting a seizure of his property, in disregard of this court's pronouncements in Lambert v. California, 355 U.S. 255; 2 L.Ed. 2d 228, 78 S.Ct. 240 (1957)

and the appellate court's pronouncements in United States v. Mancuso, 420 F.2d 556 (2nd Cir. 1970).

IV.

When, as in this case, there is authority that not only an "operator" but also an "owner" may be convicted of the Louisiana Statutory Crime of Gambling, must an "owner" run the gauntlet,waiving his privilege of self-incrimination, through registration requirements which among other requirements includes the devices' location, contrary to this court's holdings in Marchetti v. United States, 19 L.Ed. 2d 889 (1968), Haynes v. United States, 19 L.Ed. 2d 923 (1968), Leary v. United States, 23 L.Ed. 2d 57 (1969), Garrity v. New Jersey, 17 L.Ed. 2d 562 (1967), Boyd v. United States,

4
29 L.Ed. 746?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution.

2. The Fourteenth Amendment, United States Constitution.

3. 15 U.S.C. Sec. 1171-1178.

4. 28 U.S.C. 1346(b).

5. 28 U.S.C. 1254(1).

6. 28 U.S.C. 1355.

STATEMENT AND ORIGINAL JURISDICTION

A) The facts applicable hereto are set forth in the "Joint Stipulation"

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4. At the time of the seizure herein, the Louisiana Supreme Court had upheld the conviction of both an "owner" like Nick Putch; and an "operator", where the latter had used a device for gambling, splitting the profits of the device with the owner as rental. Gandolfo v. Louisiana State Racing Commission, 227 La. 45, 78 So.2d 504 (1955). This profit splitting arrangement was normally the manner in which pinball machines were rented by owners to the actual operators thereof.

below, and in a brief transcript of testimony. They actually are not in dispute. Rather than burden this Court with a total repetition thereof, we merely refer it thereto with the exception of pointing out the following portions thereof which we deem as most appropriate and sacramental to Mr. Putch's position herein, to-wit:

1. All the machines seized were in storage at his warehouse at the time of the seizures;

2. the seizures were effected without hearing or notice to him, and his attempt for a hearing was dismissed herein;

3. all the machines seized were directly purchased by him from persons or companies within the State of Louisiana, and none were shipped to him from out of state;

4. prior to the seizure, he had no knowledge whatsoever of the existence of the statutes under which the government is proceeding herein, or the requirement

of registration set forth therein;

5. there is not a scintilla of evidence that the seized machines have been or ever were used for any illegal purposes whatsoever, i.e., "gambling";

6. the ownership, possession and maintenance of these machines was legal insofar as Louisiana and local law was concerned from the effective date of the Federal Act in question through the seizure of the machines herein; however,

7. an owner of these types of machines who derived profit from their illegal gambling use was and still is subject to prosecution for the Louisiana crime of gambling under La. R.S. 14:90.

B) This action was instituted in the United States District Court by the United States of America pursuant to 28 U.S.C. 1355.

REASONS FOR GRANTING WRITS

The Court of Appeals below has decided a federal question in direct

conflict with applicable decisions of this court.

15 U.S.C. 1171, et seq. is a registration statute precisely like the one considered by this Court in Lambert v. California, 2 L.Ed. 2d 228 (1957) wherein knowledge and notice of the registration requirement were found to be a prerequisite for the imposition of sanctions for failing to register.

The courts herein below never found that the government gave notice or opportunity to comply prior to effecting a seizure, and never squarely passed upon the issue of whether proof of knowledge of the registration requirement was a prerequisite to seizure. Thus, these courts having decided the former in the negative, and the latter remaining unanswered, have by implication found that

Lambert is inapplicable to the registration statute under present consideration.

The Fifth Circuit Court of Appeals therefore has decided an important question of federal law which has not been, but should be determined by this Court.

There is no doubt that where the information sought by the government incriminates the defendant, and his failure to disclose same is punishable, the defendant is between the proverbial "rock and hard place". Marchetti v. United States, 19 L.Ed. 2d 889 (1968) and related decisions cited herein.

Likewise, there is no doubt that the government can compel the divulgence of information where the disclosure neither incriminates nor leads to incrimination.

But where there is authority that an owner is guilty of the state statutory

crime of gambling if any of his machines are used for gambling purposes and he derives profit therefrom, must petitioner disclose the existence and location of his devices, thereby incriminating himself and subjecting himself to state criminal investigation and ultimate prosecution?

Incidentally, there can be no doubt now that such registration would have resulted in state prosecution, since the State of Louisiana has now made mere possession of these machines illegal. La. R.S. 15:31 as amended by Act 130 of 1972, effective January 1, 1973.

CONCLUSION

There has never been a showing by the government that petitioner herein had either actual or constructive knowledge of 15 U.S.C. 1173 (a) (3). It has been

conceded by the government throughout this case that 15.U.S.C. 1173(a)(3) is a registration statute, that the possession of these pinball machines in Louisiana was lawful, but that splitting of gambling profits derived from their use was unlawful! Yet the courts below have failed not only to address these issues directly, but also to dispose of petitioner's contentions under this court's decisions in Lambert v. California, 2 L.Ed. 2d 228 (1957), Marchetti v. United States, 19 L.Ed. 2d 889 (1968), Boyd v. United States, 29 L.Ed. 746. For which reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BOOTH, LOCKARD, JACK,
PLEASANT & LeSAGE

By_____
H. F. Sockrider, Jr.
1004 Mid South Towers
P.O. Drawer 1092
Shreveport, Louisiana
71163

C E R T I F I C A T E

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writs of Certiorari has this date been forwarded unto all of the following at their office addresses with proper postage affixed thereto:

1. Mr. Donald E. Walter,
United States Attorney
Western District of Louisiana
P.O. Box 33
Shreveport, Louisiana 71161

2. Mr. Fred T. Bennett,
Special Attorney
United States Department of
Justice
526 St. Louis Street
New Orleans, Louisiana 70130

3. Solicitor General
Department of Justice
Washington, D. C. 20530.

Shreveport, Louisiana, this _____ day of _____, 1975.

_____
H. F. Sockrider, Jr.
Of Counsel

OPINION OF UNITED STATES DISTRICT COURT

(Title Omitted)
No. 16,581

SCOTT, JUDGE:

This is a forfeiture proceeding pursuant to 15 U.S.C. Sections 1173 and 1177. 15 U.S.C. § 1173(a)(3) provides:

> "It shall be unlawful for any person during any calendar year to engage in the business of repairing, reconditioning, buying, selling, leasing, using, or making available for use by others any gambling device, if in such business he buys or receives any such device knowing that it has been transported in interstate or foreign commerce after the effective date of the Gambling Devices Act of 1962, unless, after November 30 of the preceding calendar year and before the date on which he buys or receives such device, such person has registered with the Attorney General under this subsection."

15 U.S.C. § 1177 provides, in part:

> "Any gambling device transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed, or

> used in violation of the provisions of this chapter shall be seized and forfeited to the United States..."

The parties have stipulated and agreed to the facts in this case, which, in all relevant respects, parallel the facts presented in United States v. Various Gambling Devices, ___ F. 2d ___ (5th Cir., April 12, 1973), No. 72-2359, and United States v. 5 Gambling Devices, 346 F. Supp. 999 (1972).

On November 24, 1970, Federal agents seized the pinball machines that are the subject of this proceeding. Each of these machines is owned by the defendant Nick Putch, d/b/a Southern Music & Cigarette Company. The defendant was engaged in the business of repairing, reconditioning, buying, leasing, and making available for use by others pinball machines. Nick Putch did not register with

the Attorney General in 1970, and he knew at the time he purchased these machines that they had traveled in interstate commerce. The machines are identical to those type of pinball machines involved in United States v. 5 Gambling Devices, supra.

In his defense, Putch has argued that 15 U.S.C. §1173 is unconstitutional as violative of (1) the Fourteenth Amendment as the denial of due process; (2) the Fifth Amendment's privilege against self incrimination; (3) the due process clause of the Fifth Amendment; and (4) Article I, Section 83 of the Constitution, the Commerce Clause.

We find no support in any of defendant's defenses and direct his attention to United States v. Various Gambling Devices, supra, and United States v. 5

Gambling Devices, supra.

Plaintiff should submit a formal judgment for execution in accordance with Local Rule 9 (3) of this Court.

THUS DONE AND SIGNED in Chambers, at Alexandria, Louisiana, on this the 14th day of September, 1973.

/s/ Nauman S. Scott
UNITED STATES DISTRICT JUDGE

Filed

Sept. 18, 1973.

...o0o...

(Title Omitted)
No. 16581

ORDER OF FORFEITURE AND CONDEMNATION

In accordance with the proceedings heretofore in this case and the findings of fact and conclusions of law entered on September 14, 1973, it is:

ORDERED that the property described

in Appendix A hereto be and hereby is forfeited and condemned to the use of the United States of America;

ORDERED that the United States Marshal deliver said property to the Attorney General of the United States or his duly authorized delegate to be disposed of as provided by law;

ORDERED that all costs of these proceedings, including storage of the defendant property, be taxed against the claimant, Nick Putch, d/b/a Southern Music and Cigarette Company;

ORDERED, that upon the payment of said costs, any bonds or stipulations for costs filed herein by the claimant be cancelled and returned to him by the Clerk of Court;

ORDERED that a certified copy of this order shall be authority for the Clerk

of the Court and the United States Marshal to carry out the terms hereof;

ORDERED this the 29th day of September, 1973.

/s/ Nauman S. Scott
UNITED STATES DISTRICT JUDGE

Approved as to Form:

/s/ H. F. Sockrider, Jr.
Counsel for Claimant

Filed

October 2, 1973

...oOo...

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

55 GAMBLING DEVICES and Nick Putch, d/b/a Southern Music & Cigarette Company,
Defendant-Appellant

No. 74-1117

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

Dec. 23, 1974.

Proceeding for forfeiture of 55 gambling devices seized by Federal Bureau of Investigation from defendant. The United States District Court for the Western District of Louisiana at Shreveport, Nauman S. Scott, J., ordered the forfeiture and condemned the devices to the Government. The defendant appealed. The Court of Appeals held that there was sufficient evidence to support finding by trial court that defendant, as a person

engaging in the gambling device business over an extended period of time, had knowledge of the statutory requirement of registration with the Attorney General before engaging in the gambling device business.

Affirmed.

See also, D.C., 353 F.Supp. 66.

Gaming - 61

Evidence, in proceeding for forfeiture of 55 gambling devices, was sufficient to support finding by trial court that defendant, as a person engaging in the gambling device business over an extended period of time, had knowledge of statutory requirement of registration with the Attorney General before engaging in the gambling device business. Gambling Devices Transportation Act, § 3(a)(3), 15 U.S.C.A. § 1173(a)(3).

Appeal from the United States District Court for the Western District of Louisiana.

Before GEWIN, AINSWORTH and GEE, Circuit Judges.

PER CURIAM:

This case involves the forfeiture of 55 gambling devices seized by the Federal Bureau of Investigation from the appellant Nick Putch. The use of the gambling devices was held to be in violation of 15 U.S.C. §1173 (a)(3) and they were ultimately condemned to the government.

The appellant's sole contention on appeal is that he had no knowledge of the requirement in 15 U.S.C. §1173(a)(3) to register with the attorney general before engaging in the gambling device business. Our examination of the record

convinces us that even if knowledge on the part of the appellant was necessary to validate the forfeiture, there was sufficient evidence to sustain the comprehensive statement of the district court that it found no support for any of appellant's defenses. Testimony was taken specifically for the purpose of establishing whether the appellant had knowledge of the registration requirements. The testimony revealed that appellant had been engaged in the gambling device business for many years, and that in the course of his business he received literature from companies advertising gambling devices. Samples of this literature, which included warnings about registration requirements, were introduced in evidence. It is clear that the district court could have fairly inferred

that a person engaging in the gambling device business over an extended period of time, and who was regularly receiving advertising circulars like the kind shown to include warnings, had knowledge of the registration requirements of the statute.

Affirmed.

AMEND. 5 CONSTITUTION

AMENDMENT V--CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of

of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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CITIZENSHIP AMEND. 14

AMENDMENT XIV - CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way ab-

ridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same,

or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legis-

lation, the provisions of this article.

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15 U.S.C. § 1171. Definitions

As used in this chapter --

(a) The term "gambling device" means--

(1) any so-called "slot machine" or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(2) any other machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(3) any subassembly or essential

part intended to be used in connection with any such machine or mechanical device, but which is not attached to any such machine or mechanical device as a constituent part.

(b) The term "State" includes the District of Columbia, Puerto Rico, the Virgin Islands, and Guam.

(c) The term "possession of the United States" means any possession of the United States which is not named in subsection (b) of this section.

(d) The term "interstate or foreign commerce"means commerce (1) between any State or possession of the United States and any place outside of such State or possession, or (2) between points in the same State or possession of the United States but through any place outside thereof.

(e) The term "intrastate commerce" means commerce wholly within one State

or possession of the United States.

Jan. 2, 1951, c. 1194, § 1, 64 Stat. 1134; Oct. 18, 1962, Pub.L.87-840, §§ 2,3,76 Stat. 1075.

- - - - - -

§1172. Transportation of gambling devices as unlawful; exceptions; authority of Federal Trade Commission

It shall be unlawful knowingly to transport any gambling device to any place in a State, the District of Columbia, or a possession of the United States from any place outside of such State, the District of Columbia, or possession: Provided, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has

enacted a law providing for the exemption of such subdivision from the provisions of this section, nor shall this section apply to any gambling device used or designed for use at and transported to licensed gambling establishments where betting is legal under applicable State laws: Provided further, That it shall not be unlawful to transport in interstate or foreign commerce any gambling device into any State in which the transported gambling device is specifically enumerated as lawful in a statute of that State.

Nothing in this chapter shall be construed to interfere with or reduce the authority, or the existing interpretations of the authority, of the Federal Trade Commission under the Federal Trade Commission Act.

Jan. 2, 1951, c.1197, § 2,64 Stat. 1134; Oct. 18, 1962, Pub.L.87-840, §4,76 Stat. 1075.

§ 1173. Registration of manufacturers and dealers -- Activities requiring registration; contents of registration statement

(a)(1) It shall be unlawful for any person engaged in the business of manufacturing gambling devices, if the activities of such business in any way affect interstate or foreign commerce, to manufacture any gambling device during any calendar year, unless, after November 30 of the preceding calendar year, and before the date on which such device is manufactured, such person has registered with the Attorney General under this subsection, regardless of whether such device ever enters interstate or foreign commerce.

(2) It shall be unlawful for any

person during any calendar year to engage in the business of repairing, reconditioning, buying, selling, leasing, using, or making available for use by others any gambling device, if in such business he sells, ships, or delivers any such device knowing that it will be introduced into interstate or foreign commerce after the effective date of the Gambling Devices Act of 1962, unless, after November 30 of the preceding calendar year, and before the date such sale, shipment, or delivery occurs, such person has registered with the Attorney General under this subsection.

(3) It shall be unlawful for any person during any calendar year to engage in the business of repairing, reconditioning, buying, selling, leasing, using, or making available for use by

others any gambling device, if in such business he buys or receives any such device knowing that it has been transported in interstate or foreign commerce after the effective date of the Gambling Devices Act of 1962, unless, after November 30 of the preceding calendar year and before the date on which he buys or receives such device, such person has registered with the Attorney General under this subsection.

(4) Each person who registers with the Attorney General pursuant to this subsection shall set forth in such registration (A) his name and each trade name under which he does business, (B) the address of each of his places of business in any State or possession of the United States, (C) the address of a place, in a State or possession of the United States

in which such a place of business is located, where he will keep all records required to be kept by him by subsection (c) of this section, and (D) each activity described in paragraph (1), (2), or (3) of this subsection which he intends to engage in during the calendar year with respect to which such registration is made.

Numbering of devices

(b)(1) Every manufacturer of a gambling device defined in paragraph (a)(1) or (a)(2) of section 1171 of this title shall number seriatim each such gambling device manufactured by him and permanently affix on each such device, so as to be clearly visible, such number, his name, and, if different, any trade name under which he does business, and the date of manufacture of such device.

(2) Every manufacturer of a gambling device defined in paragraph (a)(3) of section 1171 of this title shall, if the size of such device permits it, number seriatim each such gambling device manufactured by him and permanently affix on each such device, so as to be clearly visible, such number, his name, and, if different, any trade name under which he does business, and the date of manufacture of such device.

Records; required information

(c)(1) Every person required to register under subsection (a) of this section for any calendar year shall, on and after the date of such registration or the first day of such year (whichever last occurs), maintain a record by calendar month for all periods thereafter in such year of --

(A) each gambling device manufactured, purchased, or otherwise acquired by him.

(B) each gambling device owned or possessed by him or in his custody, and

(C) each gambling device sold, delivered, or shipped by him in intrastate, interstate, or foreign commerce.

(2) Such record shall show --

(A) in the case of each such gambling device defined in paragraph (a)(2) of section 1171 of this title, the information which is required to be affixed on such gambling device by subsection (b)(1) of this section; and

(B) in the case of each such gambling device defined in paragraph (a)(3) of section 1171 of this title, the information required to be affixed on such gambling device by subsection (b)(2) of this section, or, if such gambling device does not have affixed on it any such information, its catalog listing, description, and, in the case of each such device owned or possessed by him or in his custody, its location.

Such record shall also show (i) in the case of any such gambling device des-

cribed in paragraph (1) (A) of this subsection, the name and address of the person from whom such device was purchased or acquired and the name and address of the carrier; and (ii) in the case of any such gambling device described in paragraph (1) (C) of this subsection, the name and address of the buyer and consignee thereof and the name and address of the carrier.

Retention of records

(d) Each record required to be maintained under this section shall be kept by the person required to make it at the place designated by him pursuant to subsection (a)(4)(C) of this section for a period of at least five years from the last day of the calendar month of the year with respect to which such record is required to be maintained.

Dealing in,owning,possessing or having custody of devices not marked or numbered; false entries in records

(e) (1) It shall be unlawful (A) for any person during any period in which he is required to be registered under subsection (a) of this section to sell, deliver, or ship in intrastate, interstate, or foreign commerce or own,possess, or have in his custody any gambling device which is not marked and numbered as required by subsection (b) of this section; or (B)for any person to remove, obliterate, or alter any mark or number on any gambling device required to be placed thereon by such subsection (b).

(2) It shall be unlawful for any person knowingly to make or cause to be made, any false entry in any record required to be kept under this section.

Authority of Federal Bureau of Investigation

(f) Agents of the Federal Bureau of Investigation shall, at any place designated pursuant to subsection (a)(4)(C) of this section by any person required to register by subsection (a) of this section, at all reasonable times, have access to and the right to copy any of the records required to be kept by this section, and, in case of refusal by any person registered under such subsection (a) to allow inspection and copying of such records, the United States district court for the district in which such place is located shall have jurisdiction to issue an order compelling production of such records for inspection or copying.

Jan. 2, 1951, c. 1194, §3, 64 Stat.1135; Oct. 18, 1962, Pub.L. 87-840, § 5, 76 Stat. 1075.

§1174. Labeling and marking of shipping packages

All gambling devices, and all packages containing any such, when shipped or transported shall be plainly and clearly labeled or marked so that the name and address of the shipper and of the consignee, and the nature of the article or the contents of the package may be readily ascertained on an inspection of the outside of the article or package.

Jan. 2, 1951, c,1194, §4, 64 Stat.1135

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§1175. Specific jurisdictions within which manufacturing, repairing, selling, possessing, etc., prohibited

It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possess-

ion of the United States, within Indian country as defined in section 1151 of Title 18 or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of Title 18.

Jan. 2, 1951, c. 1194, § 5,64 Stat. 1135.

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§1176. Penalties

Whoever violates any of the provisions of sections 1172 to 1174 or 1175 of this title shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Jan. 2, 1951, c. 1194, § 6, 64 Stat.1135

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§1177. Confiscation of gambling devices and means of transportation; laws governing.

Any gambling device transported, delivered, shipped, manufactured, recon-

ditioned, repaired, sold,disposed of, received, possessed, or used in violation of the provisions of this chapter shall be seized and forfeited to the United States. All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred,under the provisions of this chapter, insofar as applicable and not inconsistent with the provisions

hereof: Provided,That such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of gambling devices under this chapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

Jan. 2, 1951, c. 1194, § 7, 64 Stat.1135

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§1178. Nonapplicability of chapter to certain machines and devices

None of the provisions of this chapter shall be construed to apply --

(1) to any machine or mechanical device designed and manufactured primarily for use at a racetrack in connection with parimutuel betting.

(2) to any machine or mechanical

device, such as a coin-operated bowling alley, shuffleboard, marble machine (a so-called pinball machine), or mechanical gun, which is not designed and manufactured primarily for use in connection with gambling, and (A) which when operated does not deliver, as a result of the application of an element of chance, any money or property, or (B) by the operation of which a person may not become entitled to receive, as the result of the application of an element of chance, any money or property, or

(3) to any so-called claw, crane, or digger machine and similar devices which are not operated by coin, are actuated by a crank, and are designed and manufactured primarily for use at carnivals or county or State fairs.

Jan. 2, 1951, c.1194,§ 9, as added Oct. 18, 1962, Pub.L. 87-840, § 6, 76 Stat. 1077.

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§ 1346. United States as defendant.

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the

United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution,or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges,

Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, [together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands,] shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, [accruing on and after January 1, 1945,] for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or

employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 7426 of the Internal Revenue Code of 1954.

(f) The district courts shall have

exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

As amended Aug. 30, 1964, Pub.L. 88-519, 78 Stat. 699; Nov. 2, 1966, Pub.L. 89-719, Title II, §202(a), 80 Stat. 1148; July 23, 1970, Pub.L.91-350, § 1(a), 84 Stat. 449; Oct. 25, 1972, Pub.L. 92-562, §1, 86 Stat. 1176.

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§1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of

appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

June 25, 1948, c, 646, 62 Stat. 928.

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§1355. Fine, penalty or forfeiture

The district courts shall have original jurisdiction, exclusive of the courts

of the States, of any action or proceeding for the recovery or enforcement of any fine,penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress.

June 25, 1948, c, 646, 62 Stat. 934.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1202

55 GAMBLING DEVICES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend (1) that gambling devices are not subject to forfeiture under 15 U.S.C. 1177,[1] because of the owner's failure to register under 15 U.S.C. 1173

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[1] 15 U.S.C. 1177 provides in relevant part:

> Any gambling device transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed, or used in violation of the provisions of this chapter shall be seized and forfeited to the United States.

(a)(3),[2] unless the owner had knowledge of the registration requirement, and (2) that the registration requirement violated the owner's Fifth Amendment privilege against self-incrimination.

After a civil forfeiture proceeding in the United States District Court for the Western District of Louisiana, the court found fifty-five gambling devices (pinball machines) subject to forfeiture because their owner had failed to register with the Attorney General as required by 15 U.S.C. 1173(a)(3). The court of appeals affirmed *per curiam* (Pet. App. 23-27).

On November 24, 1970, FBI agents seized fifty-five pinball machines from Nick Putch,[3] who at the time was engaged in the business of repairing, reconditioning, buying and leasing pinball machines.[4] Although Putch knew these machines had been manufactured in Chicago, Illinois, and had been transported in interstate commerce to Louisiana, he failed to register with the Attorney General as prescribed by 15 U.S.C. 1173 (a)(3).

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[2]15 U.S.C. 1173(a)(3) provides:

> It shall be unlawful for any person during any calendar year to engage in the business of repairing, reconditioning, buying, selling, leasing, using, or making available for use by others any gambling device, if in such business he buys or receives any such device knowing that it has been transported in interstate or foreign commerce after the effective date of the Gambling Devices Act of 1962, unless, after November 30 of the preceding calendar year and before the date on which he buys or receives such device, such person has registered with the Attorney General under this subsection.

[3]On February 23, 1973, and March 13, 1973, the parties stipulated to the pertinent facts. The only disputed fact at the forfeiture proceeding on April 5, 1973, was Putch's knowledge of the registration statute.

[4]Some of the machines seized had been purchased by Putch after the passage of the Gambling Devices Act of 1962. Prior to this Act, only manufacturers and dealers were obligated to register with the Attorney General. After its passage, the purchase of a gambling device triggered the registration requirement. Since the Act compels the person and not the machines to be registered, all machines possessed by an unregistered person, regardless of their date of acquisition, are subject to forfeiture. *United States* v. *Various Gambling Devices*, 478 F. 2d 1194, 1199 (C.A. 5).

Putch, who had been involved in the pinball business for approximately twenty years, claimed that he had failed to register because he was not aware of the registration requirement (Tr. 2, 4, 7).[5] In order to show petitioner's knowledge, the government introduced into evidence several advertising circulars sent out by New Orleans Novelty and S & H Novelty, the companies from which Putch had purchased his machines. Some of these circulars contained explicit warnings concerning the federal registration requirement. Although Putch admitted receiving many such circulars and reading most of them, he denied ever receiving or reading correspondence that mentioned the registration requirement (Tr. 9-21).

1. The contention that knowledge of the obligation to register under 15 U.S.C. 1173(a)(3) is a prerequisite to a valid forfeiture under 15 U.S.C. 1177 is without merit. Although petitioner Putch acknowledges that 15 U.S.C. 1173(a)(3), as written, does not require such knowledge (Pet. 11), he asserts that proof of knowledge is necessary because of this Court's decision in *Lambert* v. *California*, 355 U.S. 225. But *Lambert* specifically distinguished the criminal registration statute at issue there from those registration laws, akin to licensing statutes, which, like the statute here, pertain to the regulation of business activity. *Id.* at 229.[6]

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[5]"Tr." refers to the transcript of the forfeiture proceedings on April 5, 1973.

[6]In any event, the district court allowed petitioner to testify at length concerning his alleged lack of familiarity with the registration requirement contained in 15 U.S.C. 1173(a)(3). The court of appeals found sufficient evidence to sustain the forfeiture, however, "even if knowledge on the part of [petitioner Putch] was necessary to validate the forfeiture." Pet. App. 26. As noted earlier, petitioner admitted that he had been engaged in the pinball business for approximately twenty years and that he had received and read many circulars advertising gambling devices. The government introduced samples of these circulars, some of which contained warnings concerning the registration requirement. In these circumstances, the district court could fairly have inferred that petitioner was aware of the need to register.

Whenever a person engages in an activity or business that by its nature suggests the possibility of governmental regulation, moreover, *Lambert* is inapplicable. See *United States* v. *Freed*, 401 U.S. 601, 607-610. Petitioner's extensive experience in a strictly regulated industry should have alerted him to the possibility of the existence of special governmental regulations applicable to that activity. This Court did not intend to excuse ignorance in such situations.[7] See *United States* v. *Various Gambling Devices*, 478 F.2d 1194, 1197-1198 (C.A. 5); *United States* v. *Weiler*, 458 F.2d 474, 477-480 (C.A. 3); *United States* v. *Betancourt*, 427 F.2d 851, 855 (C.A. 5).

2. Neither does the registration requirement violate petitioner Putch's privilege against compelled self-incrimination. Under 15 U.S.C. 1173(a)(4), petitioner Putch was only required to set forth in his registration (1) his name and trade name, (2) his business address, (3) the location of his business records, and (4) the activities enumerated in 15 U.S.C. 1173(a)(3) in which he intended to engage. Since neither the activities described in Section

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[7] *United States* v. *Mancuso*, 420 F.2d 556 (C.A. 2), does not support petitioner's contrary contention. At issue in that case was a *criminal* conviction for violation of a statute requiring registration, prior to international travel, by any person who used narcotics or had ever been convicted of a narcotic-related offense for which the possible penalty was imprisonment for more than one year. The trigger for the registration requirement in *Mancuso* was materially different, therefore, from that in the present case. While the appellant in *Mancuso* might have been able to argue with some force that he should not have been held accountable for failing to register before leaving or entering the United States—a requirement to which he was subject because of a 17-year-old conviction for violating the narcotic laws—that argument loses all force in circumstances such as are present here. As noted above, petitioner had been engaged for almost twenty years in a strictly regulated industry commonly known to be subject to registration requirements.

1173(a)(3) nor the ownership of pinball machines was illegal at the time registration was required,[8] petitioner's disclosure of such information would not have subjected him to any danger of criminal prosecution. His activity was not in an area "permeated with criminal statutes," nor was he "inherently suspect of criminal activities." *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 79. His reliance upon *Marchetti* v. *United States*, 390 U.S. 39, *Grosso* v. *United States*, 390 U.S. 62, and related cases is therefore misplaced. In those cases, registration was tantamount to admission of criminal activity; here, no such admission is entailed. In these circumstances, there was no violation of petitioner's privilege against self-incrimination.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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[8]Petitioner admits that possession of pinball machines was legal at the time of the seizure (Pet. 13). In 1970, when the seizure involved in this case took place, Putch was indisputably engaged in a legitimate business in Louisiana. As an owner and possessor of pinball machines, Putch would have been vulnerable to state prosecution only if the machines were actually used in gambling activities rather than for their amusement value—and he has made no such claim of illegal use here. See *United States* v. *5 Gambling Devices*, 346 F. Supp. 999, 1002 (W.D. La.). In any event, none of the information called for on the registration form would have disclosed whether petitioner, or others, were using the pinball machines for gambling purposes rather than for their amusement value. When La. R.S. 15:31 was amended, effective January 1, 1973, mere possession of these machines became illegal regardless of their use. This amendment was adopted long after petitioner Putch's obligation to register had matured and after the seizure of the machines here had taked place.